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IN THE

Supreme Court of the United States

No. 355. October Term, 1945

ERNEST E. SCARBOROUGH (Plaintiff-Appellant in the Court Below),

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY (Defendant-Appellee in the Court Below),

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY (DEFENDANT-APPELLEE IN THE COURT BELOW),

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The question presented by the petition is whether the petitioner is entitled to have a jury find negligence on the part of a railroad company from evidence that he, an experienced employee, who was in charge of the work being done, got a speck of rust in his eye while hanging an electric fixture on a station platform, where there was no evidence of any obligation on the part of the railroad company to remove every particle of rust that might possibly fall on petitioner, and where it was admitted that petitioner was carrying around his neck at the time of the accident a pair of goggles furnished by the company and could readily have put them on if he had wished to do so.

I. Concise Statement of the Case.

Petitioner was an experienced signalman and electrician, having been employed as such since 1918 (R. 9a). On the day of the accident he was in charge of a gang (R.

10a, 48a, 49a) comprised of two other men and himself who, for about a week before the day of the accident (R. 11a, 42a), had been engaged in replacing the wiring supplying the electric fixtures under the station shed at one of the respondent's passenger stations at Bryn Mawr, Pennsylvania.

Where, in such an operation, new metal is to be placed against old, the old metal should have the rust and scale cleaned from it in order to prevent deterioration or corrosion of the new metal (R. 14a, 49a, 50a), but such cleaning operation is not designed to protect and has nothing to do with the safety of men working on the job. Although petitioner testified that this should properly have been done with a wire brush, the cleaning operation had been performed in this case with a broom, a dust brush, and some waste (R. 14a), and petitioner, who was the boss in charge of the work (R. 48a, 49a), was satisfied that these were adequate because at no time did he ask for any additional material, brushes, or anything of that sort (R. 51a), or suspend the work until they could be obtained.

At the time of the accident the new wire had been installed and everything had been done except splicing the fixture to the feed cable (R. 48a). The rust and dirt that had been underneath the old wire had been cleaned off (R. 21a), and the petitioner was standing on a ladder (R. 22a) making a splice in the wires, when he got something in his eye. He was standing with his eyes about level with the splice he was making (R. 19a), was not looking up at the time, had glasses on, was wearing a cap and had a pair of goggles, which were supplied him by the respondent, hanging around his neck (R. 40a). He said first that as he was "about to put the box cover up against the box" he felt rust and dirt coming off the box into his eye and then looked up to see where it was coming from (R. 22a). He also said that the rust was dislodged when he put or pushed the cover against the box (R. 22a, 23a, 24a). Such rust or dirt as was dislodged came either "off the box" (R. 22a)

or from the girder (R. 23a), but there was no evidence that the rust or dust came from any portion of the girder or other metal structure that was required to be cleaned in order to install the new wiring.

There was nothing to show that the rust or dust had formed on the girder rather than on the underside of the metal roof above it, and since all contacts between new metal and old had been made and all work completed except the splicing operation (R. 48a), which was done by hand with tape, there was nothing to indicate whether the speck of rust which entered petitioner's eye had come from some place which either had or should have been cleaned or from some place whose cleaning was not needed for the work being done.

Because there was no evidence to show either that the work had been improperly done, that a wire brush, if available, would have been used to clean the portion of the structure from which came the speck of rust which got into petitioner's eye, whether the speck of rust came from a part of the structure that had been cleaned or from a part that was not required to be cleaned, or that anything could have been done which would have prevented the particle from getting into petitioner's eye (R. 48a), except the use by petitioner of the goggles which he was wearing suspended about his neck (R. 40a), the Trial Judge, on motion under Rule 50, directed a verdict for the respondent, which judgment was affirmed by the Circuit Court of Appeals for the Third Circuit.

II. Argument.

In order to recover damages under the Federal Employers' Liability Act, a plaintiff must prove that the defendant was negligent and that such negligence was the cause of his injuries; *Patton v. Texas and Pacific Ry. Co.*, 179 U. S. 658, 663; *Atchison, Topeka & S. F. Ry. Co. v. Toops*, 281 U. S. 351, 354.

Where there is uncertainty as to the inferences which may fairly be drawn from the evidence, judgment must go against the party upon whom rests the necessity of showing that he is entitled to recover. *P. R. R. Co. v. Chamberlain*, 288 U. S. 333, 339; *Spain v. Powell*, 90 Fed. (2d) 580.

Perhaps the latest reaffirmance of the necessity of proving negligence and proximate cause under the Act, and the propriety of withdrawing a case from the jury in the absence of such proof, is contained in *Brady v. Southern Ry. Co.*, 320 U. S. 476, 479, 484, where it was said:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims." (p. 479)
> "Liability arises from negligence not from injury under this Act. And that negligence must be the cause of the injury." (p. 484)

Petitioner relies upon two theories to sustain his petition; one, that respondent failed to supply a wire brush and that such failure was negligence, and the other, that even though it was not negligence to fail to supply such a brush, petitioner's fellow employees negligently performed the work preliminary to that done by petitioner and did not remove *every* speck of dust or rust from all the structures over the light fixture on which petitioner was working. These will be considered in the order stated.

(a) *There was no evidence of failure to supply adequate tools.*

Petitioner's argument that it was negligence to fail to supply a wire brush to clean the surfaces of the girder from

which the fixtures were suspended is based upon a misconception of the petitioner's own testimony as to the purpose for which such wire brush might have been used. The evidence shows clearly that the sole purpose of cleaning the surfaces of old metal was to make possible a smooth and even contact between old metal and any new metal that was to be fastened thereto (R. 14a, 49a, 50a) and that the necessity for such smooth contact was to protect the equipment and prevent corrosion and rust as much as possible. This cleaning process was in no sense a safety measure for the protection of workmen and was not for the purpose of preventing dust or particles of rust from falling on workmen during the course of their work. That hazard was guarded against by supplying men engaged in such work with goggles for their use in the protection of their eyes in any circumstances making such use desirable. Petitioner had been so supplied and at the time he got the speck in his eye he was wearing his goggles suspended around his neck. He accordingly had at hand a complete means of protection against the accident that happened. Not only had the respondent issued goggles to him and would have replaced any that were lost or broken (R. 42a) but petitioner was actually wearing them hung around his neck at the time of the accident (R. 40a), a place found most convenient to carry them for ready availability (R. 41a, 42a).

It is accordingly clear that the absence of a wire brush was not shown to have had anything to do with the accident. Even if it had been available, there was no evidence that it would have been used to clean the pieces of metal from which the particular piece of rust fell (there being no evidence that any new metal had been attached thereto at that point), but even if such cleaning operation might have been performed, it was readily observable by the petitioner that it had not been, and, accordingly, the sole cause of the accident was the petitioner's failure to use the goggles which he was carrying. Moreover, there was no evidence that the broom, dust brush and waste were not entirely ade-

quate for the purpose intended, namely, cleaning the small portion of the overhead beam, to which the fixture was to be attached, so that it would make a smooth contact, and not, as suggested by petitioner, removing every particle of dust or rust from the entire area beneath which petitioner was working and so eliminating the possibility of rust or dust becoming dislodged and falling or blowing into the eye of someone working beneath the shed.

The cases cited in his brief on this subject by the petitioner accordingly have no application, since there was no evidence offered to indicate that the tools supplied were not entirely adequate for the purpose for which they were intended to be used.

Petitioner was using no tools at the time he got the speck in his eye and needed none for the work to be performed. The only tool whose absence is here complained of is a wire brush, but petitioner was not using a brush and had no need to use one at the time of his accident. He was working with his hands and a piece of tape and needed nothing more to accomplish his purpose. To keep particles of dust out of his eyes he had goggles, which he had elected not to use. Cases involving the sufficiency of tools or the safety of the place provided to work are accordingly not controlling of any issue presented here.

Respondent never contended, as suggested by petitioner (p. 14), that wire brushes were usually supplied to facilitate the work and better to paint the iron work. No painting was being done here and no cleaning was either required or expected beyond the point of immediate contact between the fixture and the overhead beam, a spot of only a few square inches. Petitioner offered no evidence to indicate that such spot had not been properly cleaned to make proper contact with the fixture, but testified merely that when he pushed the cover against the box some particles of rust fell into his eye, which, except for his cap and his eyeglasses, was unprotected, because he was not wearing the goggles with which he had been supplied, and which

were hanging around his neck. Thus petitioner's statement (p. 15) that respondent "supplied no tool at all" is directly contrary to the evidence which he himself produced. The very instrument supplied by the company to petitioner to protect him from the identical injury received by him was in the immediate possession of petitioner but was not in use by him. This neglect of petitioner was the sole negligence disclosed by the evidence.

(b) *There was no evidence of negligence on the part of a fellow employee.*

It was not contended by respondent in either the District or the Circuit Courts that petitioner might not recover if his fellow employees were negligent, as suggested by the petitioner. Respondent, however, did there contend, as it does here, that there was no evidence of such negligence.

Nor was there any evidence, as suggested by petitioner, (pp. 15-16) that "a mass of more rust and dirt was dislodged" and fell on petitioner. The evidence was merely that some flakes of rust were dislodged when petitioner pushed the cover against the box over his head (R. 23a, 24a), and there is no evidence whatever from which it could be inferred that the presence of particles of rust on the overhead structures was due to any negligence of petitioner's fellow employees. There is no evidence showing the condition of the place where petitioner was working either before or after the accident or anything to indicate that what should have been cleaned was in fact not properly cleaned. The only evidence from which petitioner wishes to ask a jury to infer that it had not been properly cleaned is the fact that while petitioner was working on the third fixture a piece of dust or rust got into his eye. It cannot be assumed that this was a particle of rust which would not have been present if the portions of the beam to which new metal was to be attached had been properly cleaned with a wire brush. There is nothing to indicate that such cleaning as was required to provide a clean surface for the attach-

ment of such new metal parts as were being installed required every portion of the girder or the roof above it to be brushed down, or that every speck of rust and dust had to be removed so that by no possibility could a workman who was not using his goggles get something in his eye. Petitioner, in effect, assumes that preparing certain portions of the metal beam for the reception of new attachments really meant completely cleaning every portion, not only of the beam but of all other equipment in the immediate vicinity, not excluding the underside of the metal roof of the shelter shed.

Such assumption is wholly unjustified by any evidence in the case. An examination of the testimony, and particularly pages 14a, 49a and 50a, shows clearly that the only parts to be cleaned were those to which new metal was to be attached. There is no evidence that the rust complained of here came from such an area and, on the contrary, the petitioner testified that he saw some flakes "above the cable and on the girder above the box" (R. 22a). Where the attachment was made had been cleaned (R. 21a) and petitioner's testimony indicates that whatever rust or dust was dislodged by the petitioner in the course of his work came from a surface that did not require cleaning because no new metal was to be attached thereto.

To say, therefore, that petitioner's fellow employees failed in their duty is merely a gratuitous assumption without foundation in the evidence. Their duty cannot be held to have extended beyond the necessities of the job at hand. That did not require that every portion of the electrical and other equipment under the ceiling of the shelter shed should be completely cleaned and dusted as would a parlor table, and it is accordingly clear that petitioner's argument about the effectiveness of the cleaning operation or the sufficiency of the tools supplied for that purpose is wholly beside the point.

Petitioner merely ignores the purpose of the cleaning operation and assumes, contrary to the evidence, that it was

for the purpose of protecting employees from falling rust and dust and not, as petitioner testified (R. 49a), to protect new metal from corrosion when placed in contact with old metal. Except where such contact occurred there was no need to clean the old metal, unless it was to be painted, which was not intended here. Since rust and dust is always present on metal surfaces, exposed as were these, the men were all supplied with goggles to protect them against the risk of an accident such as that which occurred. Petitioner was wearing his around his neck instead of covering his eyes, but his failure to use the protection afforded him cannot support the charge of negligence directed against his fellow employees.

(c) *Assumption of risk was neither raised nor considered as a defense.*

A reading of the entire statement of the Trial Judge to the jury, only a portion of which is quoted by petitioner (p. 18), shows that it was merely a conversational explanation to the jury that they had no further duties in the case. It was not a legal opinion, nor intended to be, nor did it purport to instruct the jury on the law of the case. No motion for a new trial was filed and no attempt was made by petitioner to secure an expression of the formal opinion of the District Court supporting its action. Neither assumption of risk nor contributory negligence was discussed or considered as a defense. A verdict was directed for respondent on respondent's motion, which was based solely on the absence of any evidence of negligence on the part of the respondent or its employees (R. 54a), and it is clear that this was the sole factor which moved the Court to direct the verdict because the Trial Judge stated the question to be (R. 60a) whether he could "charge the Railroad Company with negligence." That he resolved this question in favor of the respondent and accordingly felt bound to direct the verdict furnishes no justification for petitioner's present contention that he "in effect" decided the case on assumption of

risk and contributory negligence. No such gratuitous assumption can be made to supply a foundation for an application for a writ of certiorari.

The suggested distinction between operating and non-operating employees appeared for the first time in this case on p. 8 of the petitioner's brief in this Court, and it is manifestly without substance. No such distinction exists under the Federal Employers Liability Act. Respondent admitted in its answer to the complaint (R. 5a) that petitioner was engaged in interstate commerce and that the action arose under that act and at no time during the course of the proceedings in the Courts below did anyone even suggest that such a distinction existed. It is clear that it does not, and no decision of this Court is needed to declare anything so obvious.

(d) *The evidence was not such as required submission to a jury.*

Petitioner cites a number of cases in support of the proposition that disputed questions of fact must be submitted to a jury. Neither the respondent nor either of the Courts below questioned this proposition or the authority of any of the cases referred to by the petitioner. That question is not involved in this case. Nor is there any conflict between the decision of the Circuit Court and the four cases chiefly relied on by petitioner and cited on p. 8 of his brief.

In the *Blair* case the plaintiff was injured while unloading 10-inch seamless steel tubes, approximately 30 feet long and weighing slightly more than 1000 pounds each. The pipes were greased and slick and plaintiff objected to his superior that they could not be properly handled with the equipment available, a "nose truck" of the kind commonly used in railroad stations to move freight and baggage. He was ordered to proceed and in the course of the operation one of the pipes slipped and plaintiff was injured. In that

case it was accordingly clear that the inadequacy of the equipment was directly responsible for the accident.

In the *Bailey* case the plaintiff's decedent, unskilled and perhaps unfamiliar in the opening of hopper cars, was required to stand beside a hopper car, which itself was on a bridge 18 feet above the ground below, and release the doors of the car by putting tension on a shaft by means of a wrench. As the doors were released the weight of the material in the car, which was cinders, opened the doors and the wrench would accordingly spin unless immediately disengaged. Bailey's only available footing was about 12 inches wide and there was no guard-rail on the bridge, so that the least mis-step or loss of balance would cause him to fall off the bridge. It also appeared that the intended purpose could have been accomplished by dumping the cinders before the car had been placed on the bridge. Clearly, Bailey was engaged in an inherently dangerous operation and this Court held that it was for the jury to say whether the employer had used reasonable care in furnishing a safe place to work.

In the *Pederson* case the only question considered was whether the plaintiff was engaged in interstate commerce, a fact which was admitted in the pleadings in the present case.

In the *Tennant* case a member of a switching crew was killed at night when run over by a train which was moved without a prior ringing of the engine bell, in violation of a rule of the company requiring the bell to be rung "when an engine is about to move." It was held that such violation of its own rule constituted sufficient evidence of defendant's negligence to support a finding by the jury that the rule was for the protection of the deceased and that its admitted non-observance was the proximate cause of the accident.

The facts of the foregoing cases make clear their inapplicability to this case. Here there were no tools either shown or thought by anyone to be inadequate for the purpose intended, no work to be done which had the slightest

appearance of danger, and no violation of any rule or practice designed to protect the petitioner. The injury was caused by petitioner getting a speck of rust in his eye from some unidentified portion of the structures under which he was working, a hazard against which the respondent had provided protection for all its employees by furnishing them with goggles. That petitioner rejected such protection and chose to wear his goggles hanging around his neck should not make his employer responsible in damages for the consequence of his so doing.

III. Conclusion.

It is respectfully submitted, therefore, that the petition for certiorari should be denied.

Respectfully submitted,

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